

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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THE HOUSING AUTHORITY OF THE
TE-MOAK TRIBE OF WESTERN
SHOSHONE INDIANS,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT;
et al.,

Defendants.

3:08-CV-0626-LRH-VPC

ORDER

Before the court is defendants the United States Department of Housing and Urban Development (“HUD”); Julian Castro, the Secretary of Housing and Urban Development; and Jemine A. Bryon’s, General Deputy Assistant for Public and Indian Housing, (collectively “defendants”) motion for partial reconsideration of the court’s January 14, 2015 order (Doc. #26¹) granting in-part and denying in-part plaintiff Te-Moak Tribe of Western Shoshone Indians of Nevada Housing Authority’s (“Te-Moak Housing Authority”) motion for summary judgment (Doc. #18) and defendants’ counter-motion for summary judgment (Doc. #22). Doc. #29. Plaintiff Te-Moak Housing Authority filed an opposition (Doc. #34) to which defendants replied (Doc. #37).

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¹ Refers to the court’s docketing number.

1 **I. Facts and Procedural History²**

2 Plaintiff Te-Moak Housing Authority is the Tribally Designated Housing Entity (“TDHE”)³
 3 for the Te-Moak Tribe of Western Shoshone Indians, a federally recognized Indian tribe located in
 4 Nevada. The Te-Moak Housing Authority operates two major housing programs: a low rent
 5 housing program and a mutual help home ownership program. On November 26, 2008, the Te-
 6 Moak Housing Authority filed the underlying declaratory and injunctive relief action alleging that
 7 defendants promulgated funding regulations which violated the Native American Housing
 8 Assistance and Self-Determination Act (“NAHASDA”), 25 U.S.C. § 4101 *et seq.* See Doc. #1. In
 9 particular the Te-Moak Housing Authority challenged HUD’s allocation of annual Indian Housing
 10 Block Grants (“IHBG”)⁴ pursuant to the funding allocation formula codified at 24 C.F.R. §§
 11 1000.304 - 1000.340. *Id.*

12 To determine the amount of IHBG funding a TDHE receives in a particular fiscal year,
 13 HUD first calculates the tribe’s Formula Current Assisted Housing Stock (“FCAS”) (more
 14 commonly understood as the total number of assistance-based dwelling units owned or operated by
 15 the tribe) and multiplies that number by the national per unit subsidy. 24 C.F.R. § 1000.316. After
 16 calculating each tribe’s FCAS, HUD subsequently measures the current “need” of all participating
 17 tribes by applying certain present weighted criteria to each tribe in order to equitably distribute any
 18 remaining IHBG appropriations. See 24 C.F.R. § 1000.324 (identifying seven (7) weighted factors
 19

20 ² This action has an extensive factual and procedural history. For a more in-depth history of the
 21 controversy between the parties see the court’s January 14, 2015 order on summary judgment (Doc. #26).

22 ³ A Tribally Designated Housing Entity is an entity specifically designated by the Indian tribe to
 23 administer the tribe’s housing programs.

24 ⁴ Indian Housing Block Grants are formula based monetary grants designed to provide financial
 25 assistance for a range of affordable housing activities on Indian reservations and designated Indian housing
 26 areas. Eligible activities include new housing development, continued assistance to housing developed under
 the United States Housing Act of 1937 (“1937 Housing Act”), 42 U.S.C. § 1437 *et seq.*, related housing
 services, crime prevention, and community safety.

1 as part of the need component). The tribe's annual IHBG is the resulting sum of both the tribe's
 2 FCAS calculation and determined "need."

3 A tribe's FCAS calculation begins with the total number of assistance-based dwelling units
 4 owned or operated by the tribe as of September 30, 1997. 24 C.F.R. § 1000.312. From this starting
 5 point, HUD then eliminates certain housing units from the calculation. For example, over the years,
 6 some rent-to-own units are conveyed from a TDHE's inventory due to the terms of housing
 7 agreements between the tribes and the Indian families occupying the units. Reflecting these
 8 transfers of ownership, HUD promulgated a regulation in 1998 which allowed for a downward
 9 adjustment to each tribe's FCAS calculation once a unit has been conveyed to an Indian family. *See*
 10 24 C.F.R. § 1000.318.⁵ Section 1000.318 specifically provides that a dwelling unit ceases to be
 11 counted for a tribe's FCAS calculation once a tribe "no longer has the legal right to own, operate,
 12 or maintain the unit . . . whether such right is lost by conveyance, demolition, or otherwise." 24
 13 C.F.R. § 1000.318(a). In determining the number of disqualified units, HUD relies on information
 14 provided by each Indian tribe on annual response forms.

15
 16 ⁵ Section 1000.318 reads in its entirety as follows:

17 "§ 1000.318 When do units under Formula Current Assisted Stock cease to be counted or expire
 18 from the inventory used for the formula?

19 (a) Mutual Help and Turnkey III units shall no longer be considered Formula Current
 20 Assisted Stock when the Indian tribe, TDHE [tribally designated housing entity], or IHA [Indian
 21 Housing Authority] no longer has the legal right to own, operate, or maintain the unit, whether
 22 such right is lost by conveyance, demolition, or otherwise, provided that:

23 (1) conveyance of each mutual help or turnkey III unit occurs as soon as practicable after
 24 a unit becomes eligible for conveyance by the terms of the MHOA [Mutual Help Occupancy
 25 Agreement]; and

26 (2) the Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer
 with the terms and conditions of the MHOA, including the requirements for full and timely
 payment.

(b) Rental units shall continue to be included for formula purposes as long as they continue
 to be operated as low income rental units by the Indian tribe, TDHE, or IHA.

(c) Expired contract Section 8 units shall continue as rental units and be included in the
 formula as long as they are operated as low income rental units as included in the Indian tribe's
 or TDHE's Formula Response Form."

1 During the years immediately following the promulgation of Section 1000.318, HUD
2 calculated each tribe's FCAS to include all assistance-based dwelling units owned or operated by
3 the tribe as of September 30, 1997, and only removed units from a tribe's annual calculation if
4 HUD received notice from the tribe that a unit had been either demolished or conveyed to an Indian
5 family. *See, e.g.*, Audit Report, Office of Inspector General (2001), p.275-279. However, in 2001,
6 the Office of Inspector General ("OIG") conducted a wide-scale audit of HUD's implementation of
7 NAHASDA, with a focus on HUD's implementation of the IHBG program. In its report, OIG
8 criticized HUD for failing to enforce strict compliance with Section 1000.318 as written and
9 asserted that IHBG funds had not been properly allocated in the previous fiscal years because
10 certain tribes' FCAS calculations included housing units that no longer qualified as current assisted
11 stock under a strict interpretation of Section 1000.318. Specifically, OIG opined that because most
12 housing programs under the 1937 Housing Act had standardized twenty-five year lease periods,
13 "one can reasonably expect that some of these units should be paid-off, and the [TDHEs] would no
14 longer have the legal right to own, operate, or maintain these units." Audit Report, Office of
15 Inspector General (2001), p.279. In the years following the OIG audit report, HUD implemented
16 these recommendations, including the strict interpretation of Section 1000.318 for subsequent
17 FCAS calculations. Thus, rather than only disqualifying those units for which HUD had received
18 confirmation of conveyance by the tribe, HUD interpreted Section 1000.318 to read that all
19 dwelling units that have reached the end of their twenty-five year lease period, whether or not they
20 were still owned by a tribe, should be disqualified and removed from a tribe's FCAS calculation.

21 Since 2002, HUD has conducted a yearly audit of the Te-Moak Housing Authority's IHBG
22 funding. In those audits, HUD determined that the tribe had been overfunded in each fiscal year,
23 fiscal year 2002 through fiscal year 2008, in the total amount of \$769,645.00 due to an inflated
24 FCAS calculation. HUD then requested repayment from the tribe for the overpaid funds through
25 either repayment of unspent funding or a reduction in forthcoming funding for the next several
26 years.

On November 28, 2008, the Te-Moak Housing Authority initiated the present action against HUD under the Administrative Procedures Act (“APA”), 5 U.S.C. § 706, seeking a determination that HUD’s promulgation and interpretation of 24 C.F.R. § 1000.318 was arbitrary and capricious. Doc. #1. In its complaint, the Te-Moak Housing Authority contended that the exclusion of dwelling units from the block grant formula pursuant to Section 1000.318 was in violation of the specific pre-amendment statutory language of NAHASDA, particularly 25 U.S.C. § 4152 (1996). In response to the complaint, both parties filed the present cross-motions for summary judgment. Doc. ##18, 22.

On January 14, 2015, the court issued its order on the cross-motions for summary judgment. Doc. #26. In that order, the court found that HUD’s promulgation of 24 C.F.R. § 1000.318 was within NAHASDA’s mandate, and as such, was an appropriate exercise of HUD’s funding authority. *Id.* However, the court also found that HUD’s interpretation of Section 1000.318 to exclude certain housing units from a tribe’s FCAS calculation simply because the underlying leases had passed their initial 25-year term was an arbitrary and capricious interpretation of the regulation. *Id.* Thereafter, defendants filed the present motion for reconsideration of the court’s order. Doc. #29.

II. Discussion

A motion for reconsideration is an “extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 887, 890 (9th Cir. 2000). Rule 59(e) provides that a district court may reconsider a prior order only where the court is presented with newly discovered evidence, an intervening change of controlling law, manifest injustice, or where the prior order was clearly erroneous. FED. R. CIV. P. 59(e); *see also United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998); *School Dist. No. 1J, Multnomah County v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *Hansen v. State Farm Mut. Auto Ins., Co.* 2013 U.S. Dist. LEXIS 160457, *2 (D. Nev. 2013).

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1 In its motion for reconsideration, defendants raise three challenges to the court's January 14,
2 2015, order on summary judgment. *See* Doc. #29. First, defendants contend that the court erred in
3 finding that HUD categorically excludes all housing units that are past their initial twenty-five year
4 lease term. *Id.* Second, defendants argue that the court erred by relying on facts that were not part of
5 the administrative record. *Id.* Finally, defendants contend that the court's finding that HUD's
6 interpretation of Section 1000.328 was arbitrary and capricious was improper in light of Congress'
7 amendment of NAHASDA in 2008. *Id.* The court shall address each challenge below.

8 **A. Categorical Exclusion Language**

9 In their motion, defendants contend that the court made an improper factual finding that
10 HUD categorically excludes all homes past their initial twenty-five year lease period from a tribe's
11 FCAS calculation. In particular, defendants argue that the evidence in this action establishes that
12 HUD made a specific determination with regards to the Te-Moak Housing Authority that of the 101
13 units past the twenty-five year lease period, 22 of those units could still be counted in the tribe's
14 FCAS calculation because the Te-Moak Housing Authority submitted documentation that there
15 were new owners for the units extending the pay-off date for the units past the initial twenty-five
16 year period. *See* Doc. #29. Thus, defendants argue that the record unequivocally establishes that
17 HUD does not simply exclude *all* homes past the twenty-five year lease period and the court's
18 finding to the contrary was in error.

19 Initially, the court notes that its statement that HUD's interpretation of 24 C.F.R. §
20 1000.318 excludes all homes past their initial twenty-five year lease period from a tribe's FCAS
21 calculation was a background generalization setting the stage for the issues presented in this action
22 rather than a specific factual finding of the court that HUD excludes *all* homes past their twenty-
23 five year lease terms from a tribe's FCAS calculation. In fact, it is true that in this action HUD
24 allowed the Te-Moak Housing Authority to submit documentation that some of the excluded
25 homes had new lease agreements with new owners. However, what is determinative to this action -
26 and was established in the court's order - is the undisputed fact that HUD begins its FCAS

1 calculation with the assumption that the twenty-five year lease period is a categorical cut-off point.
2 Specifically, HUD assumes that all units past the twenty-five year lease period should not be
3 counted as part of a tribe's FCAS calculation and only then allows the tribe to submit
4 documentation to revisit this assumption. It is this base assumption of exclusion under Section
5 1000.318 that the Te-Moak Housing Authority challenged and the court's order addressed. The
6 court's single sentence outlying HUD's assumption of exclusion absent documentation to the
7 contrary is not in error, nor does the fact that HUD allowed some homes to be considered in the
8 tribe's FCAS calculation for fiscal year 2008 change the court's order in any way. Therefore, the
9 court finds that defendants' challenge does not warrant reconsideration of the court's order.

10 **B. Facts Outside the Record**

11 Defendants' second challenge to the court's order concerns the multiple hypothetical
12 scenarios identified by the court to support the court's finding that HUD's exclusion of units past
13 their twenty-five year lease period is arbitrary and capricious. In the court's order on summary
14 judgment, the court found that HUD's interpretation of Section 1000.318 improperly "excludes
15 units that could not be conveyed because they were undergoing federally funded repair or
16 modernization work; excludes demolished units that were scheduled for replacement but haven't
17 been rebuilt yet; and excludes units that were not or could not be conveyed due to title
18 impediments." Doc. #45. Defendants argue that because the Te-Moak Housing Authority failed to
19 raise any of these reasons before HUD, the court exceeded the scope of its judicial review and
20 improperly considered "facts" outside the administrative record. The court disagrees.

21 The court notes that its reliance on additional examples of housing unit exclusions which
22 would be improper under HUD's interpretation of Section 1000.318 was just that, a reliance on
23 examples rather than any reliance on "facts" outside the administrative record as defendants
24 contend. As such, defendants' challenge is without merit and has no bearing on the court's order.
25 Nor does defendants' challenge address the key issue in this action which is that HUD begins a
26 tribe's FCAS calculation with the assumption that homes past their twenty-five year lease periods

1 should be excluded.

2 In its order, the court simply provided additional examples to show how HUD's
3 interpretation of Section 1000.318 was arbitrary and capricious beyond those that actually occurred
4 in this action. This is well within the court's purview. The court is allowed to consider additional
5 examples when determining whether an agency's actions were arbitrary and capricious. Therefore,
6 the court did not improperly rely on facts not in the administrative record.

7 **C. Amended NAHASDA**

8 On October 14, 2008, NAHASDA was amended by the 2008 NAHASDA Reauthorization
9 Act ("2008 Reauthorization Act"), PL 110-411, 122 Stat. 4319 (2008). Under the 2008 amendment,
10 NAHASDA's formula allocation provision was amended to incorporate some of the language from
11 24 C.F.R. § 1000.318. *See* 25 U.S.C. § 4152 (2008). Now, as part of the amended allocation
12 formula, dwelling units that are past the twenty-five year lease period, but have not been conveyed
13 from a TDHE's ownership, are removed from a tribe's yearly FCAS calculation unless the unit
14 could not be conveyed to the Indian family "for reasons beyond the control of the [recipient tribe.]"
15 25 U.S.C. § 4152(b) (2008). The amended statute further identifies what constitutes a "reason
16 beyond the control of the [recipient tribe.]" 25 U.S.C. § 4152(d) (2008). Thus, as now amended,
17 HUD is authorized by statute to disqualify from a tribe's FCAS calculation those dwelling units
18 that are more than twenty-five years old but have not yet been conveyed.

19 In their final challenge, defendants argue that because HUD's interpretation of Section
20 1000.318 as it related to the Te-Moak Housing Authority from fiscal year 2002 through fiscal year
21 2008 is consistent with the amended version of Section 4152 of NAHASDA, then its pre-
22 amendment interpretation cannot be arbitrary and capricious. The court disagrees.

23 Initially, the court finds that the fact that Congress amended NAHASDA to specifically
24 allow for the exclusion of units consistent with HUD's interpretation of Section 1000.318
25 establishes that HUD's interpretation was not proper under the pre-amendment version of the
26 statute. If 25 U.S.C. § 4125, which § 1000.318 interprets and applies, read before amendment as it

1 did after amendment - as defendants contend - then it would not have been necessary to amend the
2 statute in the first place. District courts presume that Congress would not perform such a useless act
3 as only making cosmetic amendments to a statute. *United States v. Phommachanh*, 91 F.3d 1383,
4 1387 (10 cir. 1996).

5 Further, the 2008 amendments made clear that the amendments would “not apply to any
6 claim arising from a formula current assisted stock calculation or count involving an Indian housing
7 block grant allocation for any fiscal year through fiscal year 2008.” The fact that Congress drew a
8 line between the pre-2008 version of § 4152 and the post-2008 version of the statute is a clear
9 signal that the distinction between the two versions of the statute is material and that HUD’s prior
10 interpretation of Section 1000.318 was not consistent with the prior version of the statute. If the
11 amendment was nothing but a clarification of existing law as defendants argue, then there would be
12 no need for the provision permitting tribes to file suit under the pre-amendment formula allocation
13 provision. Thus, the court finds that the 2008 amendments were far more than a cosmetic
14 clarification of the statute as defendants contend and establish that HUD’s interpretation of Section
15 1000.318 prior to the 2008 amendment of NAHASDA was arbitrary and capricious. Therefore, the
16 court finds that defendants’ third challenge is without merit and the court shall deny defendants’
17 motion for reconsideration accordingly.

18 IT IS THEREFORE ORDERED that defendants’ motion for reconsideration (Doc. #29) is
19 DENIED.

20 IT IS FURTHER ORDERED that within thirty (30) days after entry of this order the parties
21 shall file a joint status report identifying and outlining any remaining issues in this action.

22 IT IS SO ORDERED.

23 DATED this 17th day of December, 2015.

24 
25 LARRY R. HICKS
26 UNITED STATES DISTRICT JUDGE